EXHIBIT D

LEXSEE 1986 U.S. DIST. LEXIS 21624

ILLINOIS GLOVE COMPANY, Plaintiff, v. UNITED STATES OF AMERICA, CASPER WEINBERGER, Secretary of Defense; FRANK COCCIA, Director, Clothing & Textile Directorate, Defense Personnel Support Center; and FRED SIROTA, Contracting Officer, Defense Personnel Support Center, Defendants

No. 86 C 4122

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

1986 U.S. Dist. LEXIS 21624

August 12, 1986, Decided; August 15, 1986, Filed

LexisNexis (TM) HEADNOTES - Core Concepts:

OPINIONBY: [*1]

WILLIAMS

OPINION:

MEMORANDUM OPINION AND ORDER

ANN CLAIRE WILLIAMS, JUDGE

Illinois Glove Company ("Illinois Glove") has brought suit against the United States of America, Casper Weinberger, Frank Coccia, and Frank Sirota charging that Defendants violated mandatory federal contracting regulations by cancelling the "set-aside" portion of a Government procurement contract. This action is presently before the Court on Illinois Glove's motion for a preliminary injunction. Illinois Glove's motion is denied.

I

Plaintiff, Illinois Glove, is an Illinois corporation with its principal place of business in Chicago, Illinois. n1 Illinois Glove, through its plants in Effingham and Beardstown, Illinois, primarily manufactures gloves for the United States military. Illinois Glove is both a small business concern n2 and a labor surplus area concern n3 under the Federal Acquisition Regulations ("FAR"). (Verified Complaint at 3, 4 & n.2).

n1 The following abbreviations will be used throughout this Memorandum Opinion: Verified Complaint (Declaratory and Injunctive Relief) - "Verified Complaint"; Defendants Answer to Plaintiff's Complaint "Defendants' Answer"; Transcript of Hearing on Plaintiff's Motion for a Preliminary Injunction "Tr."; Plaintiff's Exhibit "PX"; Defendants' Exhibit "DX"; Deposition of Joanne Tropea - "Tropea Dep."; Deposition of Joanne Wandlass - "Wandlass Dep."; Deposition of Vera Zappile - "Zappile Dep." [*2]

n2 A "small business concern" is defined generally as:

a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the criteria and size standards in 13 C.F.R. 121 (see 19.102).

FAR 19.101 (48 C.F.R. § 19.101 (1985)).

n3 A "labor surplus area" is defined as:

a geographical area. identified by the Department of Labor in accordance with 20 C.F.R. 654, Subpart A, as an area of concentrated unemployment or underemployment or an area of labor surplus.

FAR 20.101 (48 C.F.R. § 20.101 (1985)).

A "labor surplus area concern" is defined as:

a concern that together with its first-tier subcontractors will perform substantially in labor surplus areas. Performance is substantially in labor surplus areas if the costs incurred under the contract on account of manufacturing, production, or performance of approximate services in labor surplus areas excess 50 percent of the contract price.

Id.

Defendant, the United States of America, as applicable to this lawsuit, procures goods and services through its agents [*3] for the military services. Defendant, Casper Weinberger, is the Secretary of Defense. (Verified Complaint at 4; Defendants' Answer at 2). Defendant, Frank Coccia, is the Deputy Director of the Clothing and Textile Directorate, Defense Personnel Support Center ("DPSC"), Philadelphia, Pennsylvania. (Defendants' Answer at 3) The DPSC is a subagency of the Defense Logistic Agency, which is an executive department of the Department of Defense. Defendant, Frank Sirota ("Sirota") is a contracting officer for the DPSC. (Verified Complaint at 5, Defendants' Answer at 3).

This suit arises from the DPSC's solicitation and subsequent award of contracts for mens and womens light duty Type II gloves ("Shell Gloves"). Shell gloves are unlined black leather gloves designed to be worn alone or over other gloves. The solicitation, Invitation for Bids No. DLA100-86-B-6249 ("Solicitation"), was issued on February 7, 1986. (Verified Complaint at 6, Defendants' Answer at 3).

The Solicitation was issued pursuant to a Congressional policy that the Government place a "fair proportion" of federal contracts with small businesses. 10 U.S.C. § 2301(b); 15 U.S.C. § 631(a); 41 U.S.C. § 252(b). That policy is [*4] implemented by so-called "set-asides" by which either the entire amount of an acquisition or a portion thereof is reserved or set aside for small businesses. See generally FAR 19.501(a) (48 C.F.R. 19.501(a)(1985)). Further, a portion of an acquisition may be set-aside for a labor surplus area concern. Department of Defense Federal Acquisition Regulation Supplement ("DFARS") 20.7001-20.7003 (48 C.F.R. 220.7001-220.7003 (1985)). The Solicitation here was designated as a combined small business/labor surplus area set-aside. (Verified Complaint at 6, Defendants' Answer at 3)

The procedures employed in conjunction with combined small business/labor surplus area set-asides will be discussed in detail later in this opinion. However, a summary is in order. An acquisition is divided into a non-set-aside portion, called the "formal" or "unrestricted" side, and a set-aside portion. Small businesses then bid on the unrestricted portion of the acquisition. The Government awards a contract (or contracts) to the low bidder (or bidders) on the unrestricted side. No firm submits bids on the set-aside portion of the acquisition. After awarding contracts on the unrestricted side, the Government [*5] then awards the set-aside portion through negotiations with the labor surplus area concerns that submitted responsive offers on the unrestricted side. See generally DFARS 20.7003(b) (48 C.F.R. 220.7003(b) (1985)).

The procurement at issue here began long before the Solicitation was issued or any contract awarded. The military services use approximately 85,000 to 90,000 pairs of gloves a month. (See Tr. at 192). In December, 1985, the Division of Supply Operations issued a Demand Forecast Analysis ("Forecast") that proposed that the Government procure 795,060 pairs of Shell Gloves. (DX 1 at A29-A34; Tr. 67). As to price, the Forecast indicated that the "standard" was $8.38. (DX 1 at A29). That figure represented the price per pair at which the DPSC, acting as wholesaler, would sell the Shell Gloves to the military. (Tr. at 69). In other words, $8.38 was the retail price and not the anticipated cost per pair to the Government of purchasing the gloves. (Tr. 69, 71). That figure was calculated by adding a surcharge to cover administrative costs, roughly 12-1/1%, to a base price, derived through review of previous procurements during a given time period. (Id). The Forecast [*6] also indicated that the Dollar Value] of the proposed procurement was $6,662,602.80. That figure was the commitment amount on the amount set-aside by the budgeting office, for budgetary purposes, should the proposed procurement be approved. (Tr. 68-69).

The proposal was approved by the Director of the Clothing and Textile Directorate. (DX 1 at A29; Tr. 67, 70). The DPSC then received an Advance Purchase Request Notice ("Notice"). (DX 1 at A35, A36; Tr. 71). On January 8, 1986, after receiving the Notice, Sirota, a contracting office with the DPSC, sent a document entitled "Propose]d Contract Action" to the Small Business Administration ("SBA"). (DX 1 at A10; Tr. 72). Sirota recommended that the proposed procurement have a combined small business/labor surplus area set-aside with an estimated value of $3,331,301.40. (DX 1 at

A10). The estimated value of the set-aside was one-half of the Dollar Value of the procurement as set forth on the Forecast. The SBA approved Sirota's recommendation. (DX 1 at A10).

After receiving the SBA's approval, the DPSC took the steps necessary to issue the Solicitation. The DPSC prepared a bidders list, which listed all firms that might be interested [*7] in bidding on the procurement. (DX 2B, Tab 10; TR. 65, 75). The DPSC prepared an Individual Acquisition Plan by which the DPSC sought and obtained, from its superiors, approval for the procurement. (DX 1 at A11-A15; Tr. 75, 77-78). The DPSC also published a synopsis of the proposed procurement in the Commerce Business Daily. (PX 5; Tr. 75). The synopsis ran daily for at least twenty-one days. (Tr. 76).

On February 7, 1986, Sirota issued the Solicitation. (Verified Complaint at 6; Defendants' Answer at 3). The Solicitation invited bids on 397,530 pairs of Shell Gloves, the unrestricted portion of the procurement, to be delivered in specified quantities to four destinations. In particular, the Solicitation called for 123,210 pairs for Mechanicsburg; 139,230 pairs for Memphis; 67,050 pairs for Richmond; and 68,040 pairs for Tracy. (DX 2A, Tab 2). The Solicitation incorporated DFARS 52.219-7002. n4

n4 For the relevant portions of DFARS 52.219-7002, see page 10 infra.

On March 11, 1986, the DPSC opened bids at a scheduled public opening in Philadelphia. (Tr. 81). Seven bidders, including Illinois Glove, submitted bids in response to the Solicitation. (Tr. 82). As the bids [*8] were opened, DPSC personnel prepared abstracts of the bids. (Id). DPSC personnel then took the bids to their offices and checked the bids against the abstracts to ensure that the abstracts were correct. (Id).

Illinois Glove's bid consisted of its original bid plus several letters and telegrams all of which were considered part of its bid. (Tr. 82-83). After its original bid was submitted, Illinois Glove, by a letter dated March 6, 1986, submitted an alternative bid. (DX 1 at B10). Under its alternative bid, Illinois Glove offered to deliver a maximum of 122,000 pairs of Shell Gloves to Mechanicsburg; 138,000 pairs to Memphis; 66,000 pairs to Richmond; and 67,000 pairs to Tracy. (Id). If the DPSC awarded Illinois Glove a contract for less than the maximum number offered, the price was $7.25 per pair. However, if the DPSC awarded Illinois Glove a contract for the maximum number, the price was $6.446 per pair. (Id). By a telegram dated March 10, 1986, Illinois Glove reduced all prices bid by $.30 per pair. (DX at B8). Finally, in a telegraph dated March 11, 1986, ("March 11 Telegram"), Illinois Glove stated:

In the event that the Government purchases less than the [*9] quantities shown in the solicitation for any destination then our maximum quantity offered for that destination shall be reduced by the same percentage.

(DX 1 at B9). The maximum quantities offered by Illinois Glove were approximately ninety-nine percent of the total quantity for each destination called for under the Solicitation.

The DPSC determined initially that the low bidder was a firm called MMC, Inc. ("MMC"). (Tr. 90. See DX B2, Tab 8). However, the DPSC questioned whether MMC was responsible or able to perform on the contract. (Tr. 91). Whether a particular contractor is responsible is determined by reviewing various factors such as that contractor's finances, machinery, personnel and technical ability. (Id). To determine whether MMC was responsible, DPSC conducte]d a pre-award survey. (Tr. 94). A team was sent to MMC's plant to do a study and make a recommendation on MMC's responsibility. (Id). In addition, Illinois Glove challenged MCC's responsibility. (DX 1 at B30, B31; Tr. 94). On its own initiative, Illinois Glove provided the DPSC with information tending to show that MMC was not responsible. (DX 1 at B32-B-46; Tr. 95).

In addition to initiating a [*10] pre-award survey, the DPSC sent all the bids and the abstract of the bids to the Cost and Pricing Office. (Tr.90). Cost and Pricing analyzes bids to determine which firm is the low bidder and in what quantities. (Tr. 92-93). Cost and Pricing does not make any determination as to whether the bid is reasonable. (Tr. 93, 153-154). In this instance, Cost and Pricing was asked to determine who would be the next low bidder or bidders in the event that MMC was found nonresponsible. (Tr. 91). Cost and Pricing found that Illinois Glove and Steinberg Brothers, Inc. ("Steinberg") were the lowest bidders after MMC. (DX 1 B22-B25, DX 3).

In the meantime, Sirota held discussions with Joanne Wandlass, the section chief; Richard Husser, the branch chief, and Dick Golbys, the acting division chief, concerning Illinois Glove's bid. (Tr. 96). Sirota had never before seen a bid exactly like Illinois Grove's bid. (Tr. 87-88). Sirota viewed Illinois Glove's bid as manipulative of the regulations. (Tr. 90, 96).

Under the regulations applicable to combined small business/labor surplus area ("LSA") set-asides, a small business that submits a successful bid on a portion of the unrestricted side of a procurement [*11] is asked to supply the same quantity on the set-aside portion of the procurement. The price for items on the set-aside portion of the contract is the highest price awarded to any successful bidder on the unrestricted side. The applicable regulations state:

Labor surplus concerns eligible under (1) above will participate in the LSA set-aside in the following order of priority:

Group 1. Small business concerns which are also LSA concerns. A concern in this group which has received an award on the non-LSA set-aside portion of an item shall first be requested to offer the same percentage of the LSA set-aside portion. If a percentage of the LSA set-aside portion of the item remains to be awarded, a drawing by lot shall determine the order of priority within this group for negotiations for the balance of the item.

DFARS 52.219-7002(c)(2) (48 C.F.R. 252.219-7002(c)(2) (1985)).

Subject to the exceptions listed in (ii) and (iii) below, award under the LSA set-aside shall be made at the highest unit price for each item awarded on the non-LSA set-aside, adjusted to reflect transportation, rent free use of Government property and other cost factors considered in evaluating [*12] offers on the non-LSA set-aside

DFARS 52.219-7002(c)(3)(k) (48 C.F.R. 252.219-7002(c)(3)(i) (1985)).

If Illinois Glove had simply offered to provide ninety-nine percent of the procurement, the Government, in Sirota's view, could have cancelled the other one percent. (Tr. 88, 101, 154-55). The March 11 Telegram, which reduced Illinois Glove's bid by whatever percentage the Government reduced the procurement, removed that option. Tr. 88. The manner in which Illinois Glove structured its bid ensured that one percent of the procurement would be awarded to another bidder at a higher price. (Id). If the set-aside portion of the contract were awarded, Illinois Glove could obtain up to ninety-nine percent of the set-aside at the higher price.

Sirota was concerned that because of the manner in which Illinois Glove structured it's bid, the Government would incur additional costs. (Tr. 96). Sirota was also concerned that Illinois Glove's bid constituted a threat to the integrity of the bidding system. (Tr. 97;. Sirota's superiors found that the applicable regulations bid. not prohibit Illinois Glove's bid. (Tr. 113). By an undated interoffice memorandum, Sirota suggested a change in [*13] the regulations. (PX 4).

Ultimately, MMC was found to be not responsible. (Tr. 94). Thus, the low bidders on the unrestricted side of the Shell Glove Solicitation were Illinois Glove and Steinberg. Illinois Glove's bid was for ninety-nine percent of the unrestricted side of the Solicitation or 393,000 pairs of gloves at $6.4464 per pair for a total of $2,533,278.00. Steinberg's one percent amounted to 4,530 pairs of gloves at $6.93 per pair for a total of $31,392.90. (DX 1 at D3).

Under the application regulations, Sirota, the contracting officer, had[to determine whether the price that would be paid to Illinois[GLove and Steinberg on the unrestricted side of the procurement was reasonable.

The contracting officer shall determine that a prospective contractor is responsible (see Subpart 9.1) and that the prices offered are reasonable before awarding the contract. The price analysis techniques in 15.805-2 n5 may be used as guidelines. In each case the determination shall be made in the light of all prevailing circumstances. Particular care must be taken in cases where only a single bid is received.

n5 See pages 21-22 infra.

FAR 14.407-2 (48 C.F.R. 14.407-2 [*14] (1985)). Joann Tropea ("Tropea"), the procurement agent, aided Sirota and prepared much of the paperwork. (Tr. 102). Tropea reviewed the price paid on the previous procurement of Shell Gloves and the prices offered by other bidders on the Solicitation. (Tropea Dep. 6-9). Sirota determined whether the prices offered were reasonable. (Tr. 102). Sirota reviewed the price history cards, which reflected prices paid for the same item over the previous five years, the prices offered by other bidders and changes in the leather market. (Tr. 110-111). Sirota determined that the prices offered by Illinois Glove and Steinberg on the unrestricted side were reasonable. (DX 1 at D4).

At the same time, Sirota was making a price reasonableness determination as to the set-aside portion of the procurement. (Tr. 101). Because Sirota determined the price reasonableness of the unrestricted and set-aside portions of the procurement simultaneously, he necessarily reviewed the same items in making his determination on the side-aside portion as he had on the unrestricted portion. In addition, in a memorandum dated May 6, 1986, Sirota made mathematical calculations of the cost to the Government of awarding [*15] a contract on the set-aside portion at the highest price awarded on the unrestricted side. Sirota's calculations were as follows:

$2,533,278.00	Formal Portion Award to Illinois Glove
31,392.90	Formal Portion Award to Steinberg Brothers
$2,564,670.90	Total Formal Award
$2,754.882.90	Total Set-Aside Award (at $6.93/pr.)
5,066,556.00	Total Formal and Set-Aside with 4530 pr. quantity (at $6.93) deducted from Formal and Set-Aside
$242,997.80	Additional Cost resulting from award of 9,060 pr. to Steinberg at $6.93 pr.
Divided by 9060 units	
$27.92	Unit Price for 9060 units

(DX 1 at D5). Sirota went on to state that, "[t]he price of 27.92 cannot be considered fair and reasonable." (Id). Sirota concluded that because the price on the set-aside portion was unreasonable, the set-aside should be cancelled. (Id).

Sirota then forwarded his determination to his superiors for their review. (Tr. 103). Sirota also sent his superiors the pertinent documents including Illinois Glove's and Steinberg's bids, the abstract of bids, the procurement plan, the set-aside recommendation and Cost and Pricing's analysis. (Tr. 103-104, 187-188). Sirota's superiors [*16] approved both an award to Illinois Glove and Steinberg on the unrestricted side and the cancellation of the set-aside. (DX 1 at D1, D2, D3; Tr. 107-108).

On May 13, 1986, Illinois Glove and Steinberg were awarded contracts for ninety-nine percent and one percent, respectively, of the unrestricted side of the procurement. (DX1, B3, B4). All bidders, including Illinois Glove, were notified by a letter dated May 15, 1986, that the set-aside portion of the procurement had been cancelled. (See, e.g., DX 1 at B14). Around the same time, Sirota telephoned Gilbert Shmikler ("Shmikler"), the President and Chief Executive Officer of Illinois Glove, to inform him that the set-aside had been cancelled. (Tr. 186). Shmikler offered to provide Sirota with cost and pricing data to justify Illinois Glove's bid and an award on the set-aside portion of the procurement. (Tr. 122, 185-86). Sirota chose not to consider that data. (Tr. 122).

On June 9, 1986, Illinois Glove filed this action charging that in cancelling the set-aside portion of the procurement, the DPSC, and Sirota in particular, violated applicable federal procurement law, acted in an arbitrary and capricious manner and abused their [*17] discretion. Illinois Glove requested that the Government be enjoined from spending funds to procure items sought under the set-aside portion of the Solicitation. Illinois Glove has requested also that it be awarded a contract on the cancelled set-aside.

On July 1, 1986, this Court held a hearing on Illinois Glove's request for preliminary relief. Shmikler, the only witness called by Illinois Glove, testified that the reason Illinois Glove sent the March 11 Telegram was that it was running out of work. Illinois Glove wanted to ensure that it would receive some work from this Solicitation. (Tr. 54-56). Further, the $6.446 price per pair submitted by Illinois Glove on the unrestricted side was viewed as a break even price. Consequently, Illinois Glove needed a higher price on the set-aside. (Tr. 55).

Shmikler testified to the effect failing to secure a contract on the set-aside would have on Illinois Glove. Using a chart to illustrate his testimony, Shmikler stated that if Illinois Glove did not obtain a contract on the set-aside, it would have to lay off 146 full time employees. (PX 2; Tr. 32-33). If productivity increased thereafter, approximately only a third of the laid off workers [*18] would be available for reemployment. (Tr. 34). Those workers that returned would have a temporary loss of skill. (Id). Illinois Glove would have to train new employees at a cost of approximately $5,000 per employee. (Tr. 38).

According to Shmikler, failure to obtain a contract on the set-aside would also affect Illinois Glove's ability to compete. Again using a chart to illustrate his testimony, Shmikler stated that i= Illinois Glove were awarded the set aside, its cost per hour direct labor, including all overhead, would rise less than ten cents per hour between November, 1986 and January, 1987. (PX 3; Tr. 34-36). However, if Illinois Glove is not awarded that contract, its costs would rise over fifty dollars per hour during that same time period. (PX 3; Tr. 35-36).

Finally, Shmikler testified that the Government's decision to cancel the set-aside had damaged Illinois Glove's reputation. (Tr. 38). He stated that, "we are being tarred with a brush like we are selling allen wrenches for

$7,000 or toilet seat covers for some astronomical amount...." (Tr. 39).

The Government called Sirota as its only witness. Sirota testified to the procedures the DPSC employed at every step of [*19] the procurement process. Sirota testified also as to his reasons for cancelling the set-aside. Sirota stated that he viewed Illinois Glove's bid as manipulative. (Tr. 90, 96). Sirota testified also as to the calculations he made to show the extra cost to the Government resulting from the manner in which Illinois Glove submitted its bid. (Tr. 106-07, 108-09, 139-40, 173-77).

II

This action is before the Court on Illinois Glove's motion for a preliminary injunction. To obtain a preliminary injunction, Illinois Glove must show: (1) that it will be irreparably harmed if the preliminary injunction is denied; (2) that the harm to Illinois Glove if the preliminary injunction is denied is greater than the harm to the defendant if it is granted; (3) that Illinois Glove has a reasonable likelihood of success on the merits; and (4) that the injunction will not harm the public interest. See American Hospital Supply Corp. v. Hospital Products Ltd., 780 F.2d 589, 593-94 (7th Cir. 1985); Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380, 382-83 (7th Cir. 1984). Each of these factors will be discussed in turn.

Illinois Glove asserts that, if the preliminary injunction does [*20] not issue, then it will be forced to lay-off employees, that its costs will rise astronomically, putting it at a distinct competitive disadvantage, and that its reputation will continue to be damaged. From these factors, Illinois Glove concludes that it will be irreparably harmed.

Illinois Glove originally requested that the Court enjoin the Defendants from expending any public funds to procure the items sought through the set-aside portion of the Solicitation. If the Court were to rule in Illinois Glove's favor and enter a preliminary injunction on the terms originally requested, that injunction would not prevent the harm arguably suffered by Illinois Glove. If no funds were expended, then Illinois Glove would not receive a contract on the set-aside and thus would not receive any additional work. Under the terms of the injunction as originally proposed, the threatened harm could arguably still occur. Illinois Glove, however, has modified its motion to include a request that the Court award the set-aside portion of the procurement to Illinois Glove. Awarding the set-aside to Illinois GLove would clearly thwart the alleged irreparable harm to Illinois Glove. The Court will assume that [*21] it can order such relief on a motion for a preliminary injunction.

Illinois Glove's assertion that failure to receive a contract on the set-aside will result in a reduction of its work force and an increase in its costs suffers from serious, but nonfatal, defects. Shmikler's testimony on those topics, and the charts he used to illustrate his testimony, consisted largely of unsupported unilateral assertions. Shmikler did not present any calculations to support his conclusions on job losses and cost increases. Shmikler made no effort to explain how he arrived at his conclusions. Further, the charts were not prepared by Shmikler, but only at his direction. (Tr. 31, 35).

The Court recognizes, however, that on a motion for a preliminary injunction, the Court is forced to act on an incomplete record. American Hospital Supply Corp. v. Hospital Products Ltd., 780 F.2d 589, 593 (7th Cir. 1986). The Court, consequently, will accept that failure to receive a contract on the set-aside will have a serious impact on Illinois Glove's ability to maintain its work force and costs at present levels. Further, the Court finds that the Government's cancellation of the set-aside irreparably harmed [*22] Illinois Glove by damaging its business reputation. See, e.g., Vibra-Tech Engineers, Inc. v. United States, 567 F. Supp. 484, 487 (D. Colo. 1983).

Having found that Illinois Glove will be irreparably harmed if the preliminary injunction does not issue, the Court has little difficulty finding that the harm to Illinois Glove, if the preliminary injunction is denied, is greater than the harm to Defendants if it is granted. Ostensibly, the harm to Defendants should the injunction issue is that Defendants would pay an allegedly unreasonable price for the items sought on the set-aside portion of the Solicitation. Further, the integrity of the bidding system would arguably be undermined. However, Defendants are currently in the process of changing the regulations to prevent bids like that submitted by Illinois Glove. Thus, that element of potential harm to Defendants has been removed. The Court finds that the threatened irreparable harm to Illinois Glove clearly outweighs the Defendants' having to pay an allegedly high price for goods under one contract. The Court must consider next whether Illinois Glove has shown that it has a reasonable probability of success on the merits. The parties [*23] agree that because Illinois Glove has requested that this Court review an agency action, this lawsuit is governed by the Administrative Procedure Act. See 5 U.S.C. § 702. The standard of review then is whether or not the agency action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

Illinois Glove contends that the DPSC violated its own regulations in cancelling the set-aside. Illinois Glove argues that the regulations are mandatory, requiring award of a contract on the set-aside to Illinois

Glove. Illinois Glove cites the following regulation in support of its position:

(3) Determining the LSA set-aside award price:
(i) General rule Subject to the exceptions listed in (ii) and (iii) below, award under the LSA set-aside shall be made at the highest unit price for each item awarded on the non-LSA set-aside, adjusted to reflect transportation, rent free use of Government property and other cost factors considered in evaluating offers on the non-LSA set-aside portion.

DFARS 52.219-7002(c)(3) (48 C.F.R. 252.219-7002(c)(3)(1985) (emphasis supplied by plaintiff)).

The court cannot agree. [*24] The regulation cited by Illinois Glove governs the price at which a set-aside will be awarded. It does not require that the set-aside be awarded. Further, this regulation cannot be read in isolation; but instead must be read in conjunction with other regulations. Indeed, other regulations not cited by Illinois Glove specifically allow for the withdrawal or cancellation of the set-aside.

If before contract award the contracting officer considers that a set-aside is detrimental to the public interest (e.g., because of unreasonable prices), the contracting officer shall withdraw the set-aside and, if desired, complete the acquisition by sealed bidding or negotiation, as appropriate.

FAR 20.205(a) (48 C.F.R. 20.205(a) (1985)). This regulation does not only apply in instances of gross irregularity, such as fraud or bribery, as is argued by Illinois Glove. Rather, FAR 20.205(a) is framed in broad terms and specifically refers to the situation where the contracting officer finds that prices are unreasonable.

Illinois Glove argues next that if the DPSC finds that price on the unrestricted side is reasonable, as it did so here, then it must also find that the price is reasonable [*25] on the set-aside. Illinois Glove's argument is unpersuasive. FAR 20.205(a) specifically allows for a finding of price unreasonableness on the set-aside. The contracting officer would never consider the reasonableness of the set-aside price if the price on the unrestricted side was found unreasonable. FAR 20.205(a) only comes into play after the price on the unrestricted side is found to be reasonable.

Illinois Glove counters by arguing that the DPSC deviated from its own regulations in finding that the set-aside price was unreasonable. Illinois Glove contends that the DPSC should have used one of the methods of analysis set forth in FAR 15.805-2, which provides:

The contracting officer is responsible for selecting and using whatever price analysis techniques will ensure a fair and reasonable price. One or more of the following techniques may be used to perform price analysis:
(a) Comparison of proposed prices received in response to the solicitation.
(b) Comparison of prior proposed prices and contract prices with correct proposed prices for the same or similar end items.
(c) Application of rough yardsticks (such as dollars per pound or per horsepower, or other units) to highlight [*26] significant inconsistencies that warrant additional pricing inquiry.
(d) Comparison with competitive published price lists, published market prices of commodities, similar indexes, and discount or rebate arrangements.
(e) Comparison of proposed prices with independent Government cost estimates.

FAR 15.805-2 (48 C.F.R. 15.805-2 (1985)).

Illinois Glove's argument rests on an erroneous reading of the regulations. FAR 15.805-2 is clearly permissive. It does not require that any particular method of analysis be used. Further, FAR 15.805-2 only applies to contracts acquired through negotiations. The contract here was awarded on the basis of sealed bids. The regulations applicable to sealed bidding contain a separate provision on price reasonableness, which provides:

The contracting-officer shall determine that a prospective contractor is responsible...and that the prices offered are reasonable before awarding the contract. The price analysis techniques in 15.805-2 may be used as guidelines. In each case the determination shall be made in the light of all prevailing circumstances. Particular care must be taken in cases where only a single bid is received.

FAR 14.407-2 (48 [*27] C.F.R. 14.407-2 (1985)). Under this provision, use of the techniques set forth in FAR 15.805-2 is clearly discretionary with the contracting officer. The contracting officer is simply required to consider all circumstances. FAR 14.407-2 does not tell the contracting officer either how to weigh the circumstances or which factor or factors should be determinative. FAR 14.407-2 does not require that the contracting officer consider cost and pricing data submitted by a prospective contractor.

Illinois Glove also attacks Sirota's calculation of the cost to the Government of awarding the set-aside. Illinois Glove contends that Sirota erroneously assumed: (1) that the Government had a bid of $6.44 per pair on the set-aside when in fact no one bids on the set-aside; (2) that the quantity to be awarded on the set-aside was 9,060 pairs of Shell Gloves when in face the quantity of the set-aside was 397,530 pairs; and (3) that the Government would pay $27.92 per pair on the set-aside. Illinois Glove argues that because of these assumptions, Sirota's calculation distorts the cost to§ the Government.

This Court, however, is satisfied with Sirota's explanation of his calculation. Sirota was attempting [*28] to isolate the additional cost to the Government caused by the manner in which Illinois Glove structured its bid. (Tr. 176-77). In particular, Sirota's calculation reflects the additional cost to the Government of Illinois Glove's March 11 Telegram. Absent that telegram, the Government, in Sirota's opinion, would have awarded but ninety-nine percent of the unrestricted side of the Solicitation, 393,000 pairs of Shell Gloves, at $6.44 per pair.

Steinberg's one percent, 4,530 pairs at $6.93 per pair, would have been eliminated. The highest price on the unrestricted side would then have been $ 6.44 per pair, which would then have become the price per unit on the set-aside portion of the procurement. Because the Government would have awarded only ninety-nine percent of the unrestricted side, it could only award ninety-nine percent of the set-aside. The total quantity of the procurement would be reduced by 9060 pairs of gloves. The total amount of the procurement would be reduced by $242,997.80.

Illinois Glove argues that Sirota's calculations deceived two of his superiors, Joanne Wandlass ("Wandlass"), the section chief, and Vera Zappile ("Zappile"), Associate Director of Small Business. [*29] Sirota divided $242,997.80, the total additional cost, by 9060, the total additional quantity, which yielded a price of $27.92 per additional pair of Shell Gloves. Sirota concluded that $27.92 per pair was not a fair and reasonable price. Illinois Glove argues that Wandlass and Zappile thought that the Government was going to pay $ 27.92 per pair and, consequently, approved Sirota's proposal that the set-aside be cancelled.

The Court cannot conclude that Sirota's superiors were deceived. Wandlass' deposition testimony flatly contradicts Illinois Glove's assertion. (Wandlass Dep. at 14). Zappile's deposition testimony is far from clear that she misunderstood Sirota's calculations or conclusion. (Zappile Dep. at 12-13).

Illinois Glove contends further that the DPSC had received bids similar to that submitted by Illinois Glove but had not cancelled the set-aside in those instances. Specifically, Illinois Glove refers to its bid for ninety-five percent of a procurement of anti-contact gloves and Mario Papa's bid for ninety-nine percent of a procurement of HAU-6P summer flying gloves. In those instances, however, neither Illinois Glove nor Mario Papa submitted a bid containing a restriction [*30] like that imposed by the March 11 Telegram. (Tr. 98-101). Those bids, although similar, are distinguishable and, consequently, do not present a proper basis for comparison.

Illinois Glove's final argument is that Sirota's determination that the set-aside price was unreasonable was simply an excuse to eliminate a bid he did not like. The evidence is clear that Sirota viewed Illinois Glove's bid as manipulative. In that respect, then, Sirota could be said to have disliked Illinois Glove's bid. However, the Court has not found any evidence that Sirota's price reasonableness determination was a mere pretext for eliminating that bid.

The Court finds that Illinois Glove has failed to show even a reasonable probability of success on the merits. The regulations allowed for Sirota's making a separate price reasonableness determination on the set-aside portion of the procurement. The regulations require that contracting officers take all prevailing circumstances into consideration. Sirota did so and found that the additional cost caused by Illinois Glove's method of bidding was determinative. The Court cannot say that Sirota acted arbitrarily or capriciously or abused his discretion.

Although [*31] the preceding discussion is determinative of Illinois Glove's motion, the Court will briefly address whether the requested injunction, were it to issue, would harm the public interest. If this Court were to grant the injunction, it would affect the public interest in the integrity of the bidding process and the public interest in the cost of procurements. As discussed previously, the Government is in the process of changing the regulations to prevent any further bids like that submitted by Illinois Glove. The harm to the public interest in that respect is minimal if any exists at all. As to the cost of procurement, $24,997.80, the additional cost caused by Illinois Glove's bid, is a great deal of money. Nevertheless, the military would receive the gloves it needs more quickly than if the Government were to resolicit bids. The Court finds that the injunction would not harm the public interest.

For the foregoing reasons, it is hereby ordered that Illinois Glove's motion for a preliminary injunction is denied.

Westlaw.

H
GSBCA

Protest of **Control Data** Corporation

Solicitation No. N60921-90-R-A400 Denied

October 23, **1991**

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Opinion by Administrative Judge Borwick [FN1]

This protest involves a procurement conducted by the Department of the Navy, through the Naval Surface Warfare Center (NSWC), for the Follow-On Scientific and Engineering Computing System (FOSECS), for high-speed powerful computing systems to support NSWC's mission of research, development, testing, and evaluation for surface ship weapons systems. FOSECS is an upgrade of NSWC's present system. NSWC awarded the FOSECS contract to Federal Computer Corporation (FCC), the intervenor in the protest. The protester is the Control Data Corporation (CDC).

The request for proposals (RFP) contemplated contract award to the low cost offeror meeting minimum mandatory requirements. In its third amended complaint, CDC alleges that respondent's award to FCC must be overturned because the contracting officer, in violation of statute and regulation, awarded the contract to FCC when FCC's proposal failed to meet the RFP's mandatory requirement of common architecture of phases.

The RFP provided that, for evaluation purposes, the cost of hardware maintenance would be evaluated on the basis of extended hours (twenty-four hours per day, seven days per week). CDC alleges that FCC's proposal for extended hardware maintenance is so severely underpriced as to cause FCC an inevitable loss. CDC thus argues that the contracting officer failed to make an adequate determination of the reasonableness of FCC's prices.

CDC also alleges that the contracting officer, in violation of the Federal Acquisition Regulation (FAR), illegally reopened negotiations for a second best and final offer (BAFO). Finally, CDC alleges that the contracting officer wrongfully allowed FCC to substitute equipment that was not commercially available for equipment that was commercially available, in violation of the RFP.

Earlier, we suspended respondent's delegation of procurement authority and denied respondent's motion to dismiss on the ground that CDC, allegedly, lacked interested party status. Control Data Corp., GSBCA No. 11376-P (Sept. 10, 1991). [FN2]

We deny the protest. We conclude that FCC met the minimum mandatory requirement CDC alleged was violated. We conclude that the contracting officer made a reasonable price analysis. The analysis was not perfect by any means, but in light of all of the evidence in the record was not clearly defective. We conclude that the FAR in this instance does not prohibit the contracting officer from reopening discussions and calling for a second round of BAFOs because there was no risk of auction. Furthermore, CDC has not made a case for wrongful substitution of equipment. In this regard, all FCC has done is indicate its intention to submit an engineering change proposal, which was its right.

Findings of Fact

The Requirement

1. The procurement contemplated acquisition of four separate systems (called phases 1 through 4). The phases are, respectively, the secret general computing system, the secret strategic computing system, the top secret strategic systems computing system, and the unclassified general purpose computing system. Phase 1 is to be located in Building 1200 at the Dahlgren site of NSWC, phases 2 and 3 are to be located in Building 1550 of the site, and phase 4 is to be placed at NSWC's White Oak site. Protest File, Exhibit 2, ¶ C.2.2.1.

2. The phases were themselves subdivided into increments, with phase 1 having three increments and phases 2 through 4 having two increments each. [FN3] The first increment of each phase is the initial system, with the remaining increments being the expansion system. Protest File, Exhibit 13, § XII, Table XII-2. Phase 1 had the greatest requirement for interactive access, specifying 64 connections for increment 1, 148 for increment 2, and 180 for increment 3. The access requirements for other phases were between 50 and 96 terminal-to-host connections. Id.

3. NSWC anticipated phase 1 to be the initial segment, followed by phases 2 through 4. However, NSWC reserved the right to require delivery and acceptance of any phase out of order, that is, for example, to require delivery and acceptance of phase 4 before phase 1. Protest File, Exhibit 2, ¶ C.2.3.1.

4. The RFP specified the same subsystems for all phases. Each phase is to have a desktop subsystem, integration subsystem (INS), high performance subsystem (HPS), archival subsystem (ARC), peripheral subsystem (PES) and high speed network (HSN). Protest File, Exhibit 2, ¶ C.2.2.6. The INS is for application development and management, and management of databases, the network, and support of phase utilities such as files, mail, security and printing. Id., ¶ C.2.6.6.2. The HPS is for jobs requiring high- performance computations. Id., ¶ C.2.2.6.3.

The Evaluation Plan of the RFP

5. The evaluation plan provided in pertinent part:

M.1. EVALUATION OF PROPOSALS

....
b. To be eligible for evaluation and acceptable for award, proposals must ... (2) meet all mandatory requirements set forth in Section C.... Proposals complying with the provisions of the solicitation will be evaluated; award will be made to that responsible offeror whose proposal is determined to be fully compliant with the specifications and offers the lowest evaluated price to the Government....

Protest File, Exhibit 2.

Common Architecture Requirement

6. The RFP contained a requirement, expressed below, for common architecture of each subsystem across phases:

C.2.2.2. Common Architecture of Phases

Each Phase shall use the same hardware and software architecture in order to provide capability for backup, additional capacity, or special purpose application. This common architecture requirement applies on a Phase to Phase comparison; that is, the like subsystems of all Phases must have the same architecture (e.g. all High Performance Subsystems), but the subsystems within a phase need not have the same architecture except as needed to meet the "Open Systems" requirements of Section C.2.2.5.4.

In response to vendor questions concerning the meaning of "same hardware and software architecture," respondent stated:

that ... the hardware and software ... proposed must be compatible with each other such that programs that are run on one Computing System can be run on any other system (i.e. they must conform to the Open Systems requirement). The INTENT of the Government is to insure compatibility between all processing subsystems in all Phases (i.e. HPS and INS).

Protest File, Exhibit 25, Question Number 7. The open systems requirement was defined as the "capability to interface and interoperate with several major manufacturer's systems, even if the capability is proprietary." Id., Exhibit 2, ¶ C.2.2.5.4.

Hardware Proposals and Common Architecture of Hardware Proposed

7. For phases 1 through 4, CDC proposed a Cray YMP2E for the HPS, and a network of CDC 4680s, linked by ethernet cable, for the INS. Protest File, Exhibit 13; Transcript at 180. For phase 1, FCC proposed a Cray YMP2E for the HPS and the Cray YMP2 for the INS. The Cray YMP2 supplied for the INS was to be supported by a solid state storage device (SSD) for data storage. For phases 2-4, FCC proposed the Cray YMP2E for the INS, rather than the Cray YMP2. Id.; Respondent's Trial Exhibit 1. Thus, FCC proposed a total of eight Cray systems (two per phase), six to be installed at the Dahlgren site and two at White Oak. Id.

8. Cray considers the YMP2 and the YMP2E to have common architecture. Cray's marketing representative writes:

Both Cray computers use compatible hardware and software organizational structures. In fact, the Cray YMP2E system is fully compatible with all members of the Cray Y-MP supercomputer product line. The Cray YMP2E and YMP2 run Cray Research's current UNICOS operating system, program compilers, software tools and applications. The true test of compatible hardware and software comes when object programs/machine binaries can be moved between systems and obtain the same results. The Cray YMP2(D) and the Cray YMP2E are capable of passing this test.

Intervenor's Hearing Exhibit G-1.

9. CDC's expert on common architecture testified that the Cray YMP2 and YMP2E processors did not have common architecture because the two processors do not use the same operating system. He testified further that the YMP2E has a circular input/output buffer, while the YMP2 has a buffer memory. Thus, programmers could utilize the YMP2's buffer memory to store program files; applications so programmed would not run on the YMP2E. Protester's Hearing Exhibit G; Transcript at 288-89. This expert also testified that use of the YMP2E's enhanced input/output capabilities (data transfer rates) might result in a bottleneck if a program written for the YMP2E were run on a YMP2. Protester's Hearing Exhibit G; Transcript at 284, 294-96.

10. Respondent's expert acknowledged the difference of input/output design of the two processors, but testified that the difference was insignificant to the compatibility of the architecture from a user's viewpoint. He considered use of a buffer memory of the Cray YMP2 to store program files to be "highly irregular", "pathological," and computer malpractice. Transcript at 478, 500, 512. Aside from that extreme case, applications programs are fully compatible between the two machines. Transcript at 500. Respondent's expert is quite familiar with NSWC's environment, having been a consultant to NSWC. Respondent's Hearing Exhibit 5; Transcript at 460-61. Respondent's expert cannot envision a case when NSWC would saturate input/output capability. Transcript at 476-77.

Hardware Maintenance Requirement

11. The RFP provided for on site maintenance during the principal period of maintenance (PPM), that is 7:00 a.m. to 4:00 p.m. Monday through Friday "at each geographic site for the equipment proposed" at the rates set forth in pricing tables. Protest File, Exhibit 2, ¶ C.8.1.1.3. Vendors never sought further definition of the term "site." Transcript at 575. During all PPM periods, the contractor shall insure that there are "maintenance personnel on- site who are certified by the HPS and INS Original Equipment Manufacturers (OEM), respectively, and are capable of taking immediate remedial action for failures of the HPS and INS." Id. For both preventive and remedial maintenance, the RFP required maintenance service to "maintain all equipment ... within hardware specifications and in good operating conditions (not less than 95% effectiveness level.") Id., ¶ C.8.1.1.a.

12. The RFP required vendors to supply a pricing table, B-2B, showing charges for the PPM and charges for extended maintenance based on percentages of the basic monthly maintenance charge (BMMC). Protest File, Exhibit 2, ¶ B.2.4.3. Vendors were required to price extensions of PPM up to twenty- four hours, Sunday through Saturday. Id. For purposes of evaluation, when the warranty period was not applicable, the hardware prices would be "increased by the highest percentage shown in Table B-2B to produce the monthly prices used to calculate Table B-7B." Id., ¶ M.4.1.3.2.1. Table B-7B was the hardware maintenance monthly price table to be evaluated. Id., B.2.5.2. If these provisions are read together, the evaluation of maintenance pricing was based on a level of service of twenty-four hours per day, seven days per week. Id., ¶ ¶ B.2.5.2, M.4.1.3.2.1.

Hardware Maintenance Pricing Proposals

13. Cray has a virtual monopoly on maintenance of its computers. Only Cray-certified technicians can maintain Cray computers and only employees of Cray can obtain maintenance parts, and access to maintenance manuals. Transcript at 190-91. CDC and Cray had negotiated a potential subcontract for hardware maintenance (and other items), to be effective upon NSWC's contract award to CDC. Protest File, Exhibit 38; Transcript at 337. The agreement provided for a basic monthly maintenance charge (BMMC) for central processor maintenance of [* * *] for the initial configurations of phases 1 and 4, and a basic monthly maintenance charge of * * * for the initial configurations of phases 2 and 3. Id., Table B-1. There were separate monthly charges-- between * * *--for maintenance of upgrade options. Id. These charges applied to maintenance for on-site coverage, five days per week, eight hours per day. Protest File, Exhibits 37, 38.

14. Maintenance for twenty-four hours, seven days per week (plus holidays) is charged at * * * the BMMC based on a two hour response time during on-call periods outside of the PPM of five days per week, eight hours per day. Protest File, Exhibit 38, Table B-3; Transcript at 192. Cray offered [* * *] and [* * *] based on [* * *] at the same location. Id., Exhibit 38. CDC's pricing to respondent was based on [* * *].

15. CDC priced its proposal on the assumption that there had to be at least one OEM certified technician per subsystem (HPS or INS), during the principal period of maintenance, because of its interpretation of paragraph C.8.1.1.3. of the RFP as requiring OEM certified technicians and immediate maintenance response time. Transcript at 200, 204, 216. [FN4] CDC, however, never established the precise number of personnel it would order from Cray to perform the hardware maintenance for each phase. Transcript at 223.

16. Cray's pricing to FCC for the BMMC for the initial increment of phase 1 was [* * *]. The BMMC was [* * *] for the YMP2Es offered in the other phases. Protest File, Exhibit 46, Table B-7. Cray's pricing of extended maintenance to FCC was consistent with its pricing to CDC, i.e, at [* * *] percent of the BMMC for twenty-four hours per day, seven days per week service. Id., Exhibit 46, ¶ 3, and Exhibit 38, Table B-3; Transcript at 122. Cray offered [* * *]. The [* * *] were applicable to [* * *] Id., Exhibit 46, ¶ 16.

17. FCC offered NSWC twenty-four hour per day, seven days per week maintenance "at no additional charge for the life of the contract," i.e., [* * *] Protest File, Exhibit 4; Transcript at 657. FCC offered discounts [* * *] for maintenance of five days per week, eight hours per day; [* * *] for maintenance of sixteen hours per day, five days per week; and of [* * *] for maintenance of twenty-four hours per day, five days per week. Id., Exhibit 4.

18. FCC's pricing was based on several assumptions. The first was that given multiple systems at the Dahlgren site, twenty-four hour per day, seven days per week on-site maintenance personnel, if ordered by respondent, would not be required for each system, and that the on-site maintenance person could "double up" on maintaining processors. [* * *].

19. Another assumption was that equipment substitution (with newer technology) during the later years of the contract would lower maintenance costs as maintenance on the newer technology would cost less. Transcript at 643. [* * *].

20. CDC's expert prepared a report purporting to demonstrate that Cray's pricing of hardware maintenance to FCC would be [* * *] more than FCC's pricing of hardware maintenance to NSWC. According to CDC's expert, Cray's maintenance pricing to FCC

for maintenance in accordance with the evaluation model would be [* * *] and FCC's price for Cray maintenance on the evaluation model to NSWC is [* * *] Protester's Hearing Exhibit B; Transcript at 139.

21. The expert's analysis was based on the assumption that NSWC would be ordering maintenance on the INS and HPS at a level of twenty-four hours per day, seven days per week, i.e., the evaluation model under the RFP. Transcript at 140, 162-163. She did not factor in any estimates of what the actual ordering patterns under the contract might be, or the possibility of equipment substitution which would lessen maintenance costs. Id. Under the present contract, NSWC is ordering maintenance at sixteen hours per day five days per week for the past four and one half years. Transcript at 395. There is one user at the Dahlgren site who might require maintenance under the new contract for twenty-four hours per day, seven days per week for an unknown period of time. Transcript at 414.

22. Respondent's cost analyst had estimated that the addition for twenty-four hour, seven days per week maintenance would be about forty percent. Transcript at 577. After submission of BAFOs the cost analyst considered CDC's maintenance pricing high. He recognized that FCC had aggressively priced its hardware maintenance proposal, but thought such pricing reasonable. FCC proposed an exclusively Cray system, leading the cost analyst to believe that FCC could obtain more favorable hardware maintenance pricing terms from Cray than could CDC, which was proposing a hybrid system. CDC would need separate teams of OEM-certified technicians to service its differing brand components, while FCC needed only a single team to service Cray components. Transcript at 550-51. However, the analysis of Cray's pricing was, by the analyst's own admission "[A]ll speculation. We had no knowledge of what they were doing with their subcontractors." Transcript at 561. The final factor was that the RFP did not specify a set number of technicians, but only a ninety-five percent effectiveness rate, thus allowing vendors flexibility in maintenance approach. The cost analyst thought that FCC had found an approach that would allow it to use a lesser number of technicians than CDC intended to use. Transcript at 563-64.

Reopening of Best and Final Offers

23. Hardware pricing evaluation was based on acceptance of equipment according to an acceptance schedule set forth in the solicitation. For the purpose of evaluation and for no other purposes, it was assumed that the initial system of phase 1 would be accepted in month one, the second increment accepted in month twenty-five and the third increment accepted in month seventy-three. Similarly, it was assumed that the initial system for phase 2 would be accepted in month thirteen and the second increment would be accepted in month forty-nine. Protest File, Exhibit 2, ¶ M.4.1.3.1.b.

24. The solicitation warned vendors that unbalanced offers could be rejected:

M.1.2 EVALUATION OF UNBALANCED OFFERS

a. Any offer which is unbalanced as to prices for the basic quantities, optional quantities, or optional periods may be rejected. An unbalanced offer is one which is based on prices significantly less than cost for some items and prices which are significantly overstated for other items. There must be a direct and reasonable relationship between the consideration paid by the Government and the quid pro quo received by the Government on a contract year basis.

Protest File, Exhibit 2.

25. On February 28, 1991, FCC asked if "pricing designed to reflect historically proven decreases in ADP equipment prices over time are acceptable." Protest File, Exhibit 40. NSWC responded by referencing paragraph M.2.(c).1, the requirement for fixed and determinable pricing and the prohibition against unbalanced bidding. Protest File, Exhibit 20.

26. On June 7, 1991, NSWC requested BAFOs from FCC and CDC. Protest File, Exhibits 21 and 22. Again, NSWC advised both vendors that prices must be fixed and determinable and should not be structured to be unbalanced. Id.

27. On June 21, 1991, FCC submitted its BAFO, which had the lowest hardware prices for the evaluation months, and prices about twenty percent higher in months before and after the acceptance month for evaluation purposes. For example, the evaluation month price for CLIN 0001, the phase 1 central processor, was [* * *] while the price for the non-evaluation month was [* * *]. Protester's Hearing Exhibit C. This practice was consistent throughout FCC's hardware pricing proposal. Protest File, Exhibit 23; Protester's Hearing Exhibit D; Transcript at 42, 156-58. [FN5] Vendor's prices or technical solutions were not revealed as a result of the submission of BAFOs. Transcript at 545.

28. NSWC procurement officials considered the proposal materially unbalanced because: "there is no assurance that the options will be exercised at the same time as they were evaluated, and thus, no assurance that the low evaluated offer will result in the lowest overall cost to the Government." Protest File, Exhibit 23. At that time, the difference in price between CDC's proposal and FCC's proposal was $24,570,068. Given the price difference, respondent's officials determined that it was in the "best interest" of the Government to reopen discussions and request another round of BAFOs. Id. At that time, prices had not been revealed. Transcript at 599-600. In its second BAFO of July 5, 1991, FCC corrected the condition that caused the material imbalance. Protest File, Exhibit 13.

29. After the second BAFO, the vendors' prices per category and total price were:

	CDC	FCC
Hardware	$30,079,422	$35,427,308
Hardware Maintenance	20,354,511	19,464,525
Software	5,716,933	4,126,554
Software Maintenance	5,888,084	6,820,212
Software Analysts	9,908,444	7,813,095
Site Preparation	1,603,827	0
Training	847,319	589,920
Manuals	821,530	0
Extended Hardware Maintenance Hours	17,709,261	0
Power & Cooling	2,153,629	3,512,755
Evaluated Optional Features	185,000	185,000
Total (unadjusted)	$95,294,960	$77,939,369

Protest File, Exhibit 13.

Substitution of Equipment

30. The RFP required that all equipment (with an exception not relevant here) offered under the contract be formally announced for marketing purposes at the time of proposal submission. Protest File, Exhibit 2, ¶ C.2.5.b. In early February 1991, both vendors notified NSWC that they desired to revise proposals and propose the Cray YMP2E (the HPS for CDC and the HPS and INS, phases 2, 3, and 4 for FCC). FCC could not use the Cray YMP2E for the INS of phase 1 because of the high interactive user requirements. That requirement could only be satisfied by use of the SSD, which, at the time of proposals, did not work with the Cray YMP2E. Therefore, FCC continued to propose the Cray YMP2 for the phase 1 INS. Protest File, Exhibit 13.

31. Phase 1 originally had two increments. Budget cuts then affected NSWC's ability to order a phase 1 (increment 1) system of the size specified. NSWC created a three increment phase 1, with the first increment being the same size as phase 4, increment 1. Transcript at 535-36. [FN6] FCC proposed the Cray YMP2E processor for phase 4 INS. Protest File, Exhibit 14, at B-5. NSWC intends to order the phase 4 processor to meet the requirements of phase 1, increment 1. Id.

32. Clause H.2 of the RFP provided that after contract award, the Government may solicit (or the contractor may independently propose) engineering change proposals "to save money, to improve performance, to incorporate new technology." Intervenor's Hearing Exhibit P. In its offer, FCC proposed the Cray YMP2 to meet the remaining two increments of phase 1, but indicated its intention to submit an engineering change proposal to substitute the Cray YMP2E for the YMP2 when the YMP2E is engineered to work with the SSD. NSWC has not approved the engineering change proposal; FCC's offer is not conditional upon the engineering change proposal being approved, and in the absence of approval of the engineering change proposal, FCC is bound to deliver a Cray YMP2 when phase 1 requirements are ordered. Transcript at 536.

Award

33. On September 20, 1990, the contracting officer prepared a pre- negotiation clearance memorandum issued for the purpose of obtaining approval to conduct negotiations and receive BAFOs. He there concluded that FCC was financially sound, with a good credit rating. Protest File, Exhibit 24.

34. A pre-award survey of April 10, 1991, conducted by the Defense Contract Administration Office in Baltimore, Maryland, indicated that FCC had four open contracts with the Government, all being performed satisfactorily. The survey revealed FCC's net worth to be [* * *] with an asset to debt ratio of [* * *]. Protest File, Exhibit 12; Transcript at 556. FCC's working capital was [* * *]. Given those factors, the analyst concluded that FCC was financially capable of performing the contract. At that time, FCC's total offered price was [* * *]. Protest File, Exhibit 12.

35. On July 19, 1991, after submission of the second BAFOs, the cost analyst prepared a post-negotiation business clearance memorandum, to summarize the events occurring after the pre-negotiation clearance memorandum and to document the

results of subsequent negotiations. Transcript at 554. The summary analysis in the post-negotiation business clearance memorandum found FCC to have offered a technically acceptable proposal at the lowest evaluated price over a ten year period. FCC was found to be in good financial condition and the proposed prices were determined to be fair and reasonable. Protest File, Exhibit 13. Award to FCC was recommended for a total evaluated price (taking into account the time value of money) of $69,415,059. On July 26, 1991, NSWC awarded the contract to FCC. Protest File, Exhibit 14.

Discussion

Common Architecture

The evaluation and award methodology for this procurement, as expressed in the RFP, was that the low cost vendor meeting minimum mandatory requirements would be awarded the contract. Vendors who did not meet minimum requirements would be eliminated. Finding 5. When an RFP calls for vendors to meet mandatory requirements upon pain of elimination, with the lowest cost being the determining factor for compliant proposals, acceptance of a vendor's non- compliant proposal by the contracting officer violates the provisions of the CICA requiring: (1) evaluation of proposals based solely on the factors specified in the solicitation, 10 U.S.C. § 2305(b)(1) (1988), and (2) award of contracts considering only cost or price and the other factors included in the solicitation. 10 U.S.C. § 2305(b)(4)(D) (1988). Acceptance of such a proposal also violates 48 CFR 15.608(a) (1988) ("agency shall evaluate competitive proposals based solely on the factors specified in the solicitation"). and 48 CFR 15.611(d) (1988) ("[T]he contracting officer ... shall select that source whose best and final offer is most advantageous to the Government considering only price and the other factors included in the solicitation."). The reason the contracting officer violates these statutes and regulations in accepting a non-compliant proposal is that award would not be based only on cost and price and the other factors of the RFP. See Sysorex Information Systems Inc., GSBCA No. 10642-P, 90-3 BCA ¶ 23,181, at 116,371-372, 1990 BPD ¶ 193, at 20-21.

When an RFP adopts this evaluation scheme, vendors often protest, claiming that their competitor's proposal failed to meet minimum requirements and thus was ineligible for award. CDC mounts such an attack here, focusing on the requirement for "common architecture of phases." Finding 6. FCC offered the Cray YMP2 and the Cray YMP2E for the integration subsystem (INS) of phase 1 and phases 2-4 respectively. Finding 7. CDC argues that the Cray YMP2 and the Cray YMP2E have different architectures, and thus the contracting officer violated the statutes and regulations noted above in accepting FCC's proposal.

We conclude that CDC has an overly restrictive view of the "common architecture" requirement. Both experts acknowledged that the input/output processors of the machines proposed for the INS phases were different. Findings 9, 10. IF common architecture referred only to hardware design, CDC's position might be valid. Respondent, however, clarified the meaning of the requirement through question and answer number seven to define common architecture in terms of the capability of running software in a compatible manner. Finding 6. In short, respondent changed what was a design specification to a performance specification. There was varying expert testimony on whether the architecture of the two processors was "common" so as to allow software to perform on like subsystems of phases in a compatible manner. While CDC's expert was credible as to the theoretical possibility of software incompatibility, respondent's expert was equally convincing that in the world of NSWC's real work, there would be no actual difference to software compatibility. Finding 10. CDC has not shown that the contracting officer accepted a proposal that failed to meet the minimum mandatory requirement of common architecture as clarified by respondent and as understood by the vendors in the procurement.

Hardware Maintenance Pricing

CDC claims that FCC's hardware maintenance pricing was unrealistic, that it was "buying in" to the contract, that the contracting officer made an unreasonable price determination, and that with its below-cost maintenance pricing, FCC could not reasonably be found to be a responsible offeror. CDC's arguments are not persuasive.

It is not disputed that a price analysis alone (as opposed to analysis of cost or pricing data) was needed for this procurement. 48 CFR 15.804-3(a), (b); 15.805-1(b) (1990). In making a price analysis, the contracting officer is responsible for using whatever price analysis techniques are needed to ensure fair and reasonable prices. 48 CFR 15.805-2 (1990). We will upset such price determinations only if there is a showing that the contracting officer's pricing determination is clearly defective. Hughes Advanced Systems Co., GSBCA No. 9601-P, 89-1 BCA ¶ 21,276, at 107,328, 1988 BPD ¶ 253, at 48.

CDC argues that, with FCC essentially giving extended hardware maintenance for free, Finding 17, the contracting officer's determination of reasonable prices cannot be correct.

Here, the contracting officer's analysis during the course of the procurement was, to be frank, less probing than it might have been, based as it was (by the analyst's admission) on speculation on Cray's advantageous pricing and not on hard data. Finding 22. That the analysis is not clearly defective is confirmed by the additional evidence introduced in the hearing of this protest. FCC has convincingly shown that, with anticipated new technology, hardware maintenance costs may significantly decrease.

[* * *] Finding 19. FCC has also shown that maintenance coverage could be structured to meet the ninety-five percent effectiveness requirement without supplying full-time maintenance personnel for all processors. Finding 18. FCC intends to use maintenance personnel at each site to service several processors. Finding 18.

As evidence that the pricing analysis was defective, CDC contrasts FCC's prices with its higher price. CDC priced its proposal assuming that a full time maintenance person would be needed per subsystem for each phase. Finding 15. However, the requirement was for on-site maintenance "at each geographic site for the equipment proposed," and not for each "processor proposed at each site." Vendors never sought clarification of the term site, Finding 11, and must content themselves with the least restrictive interpretation of the term. E.g., Unisys Corp., GSBCA No. 11069-P, 91-2 BCA ¶ 23,879, at 119,606, 1991 BPD ¶ 83, at 24; PCA Microsystems, Inc., GSBCA No. 9597-P, 88-3 BCA ¶ 21,081, 1988 BPD ¶ 180; Microsolve Inc., GSBCA No. 8564-P, 88-1 BCA ¶ 20,321, 1987 BPD ¶ 244, aff'd, Microsolve v. United States, 856 F.2d 202 (Fed.Cir.1988); Synercom Technology Inc., GSBCA No. 8700-P, 87-1 BCA ¶ 19,477, 1986 BPD ¶ 208. It appears that CDC might have priced its proposal a bit conservatively in view of the least restrictive definition of the word "site" in the RFP as referring to Dahlgren and White Oak. CDC's pricing proposal does not serve as a valid point of contrast to demonstrate that the contracting officer's pricing analysis of FCC's proposal was clearly defective.

CDC also relies on the requirement for "maintenance personnel on-site who are certified by the HPS and INS Original Equipment Manufacturers (OEM), respectively, and are capable of taking immediate remedial action for failures of the HPS and INS" in paragraph C.8.1.1.3 of the RFP. CDC argues the specification implies a maintenance response requirement more stringent than ninety-five percent. We disagree; that requirement was meant to define the capability of the personnel, rather than to define a response time.

CDC also accuses FCC of buying in the contract. It argues, based on its expert's analysis, that FCC underpriced its proposal by [* * *] principally because of the zero addition for twenty-four hour, seven day per week maintenance. We are not convinced. First, CDC's cost of maintenance at the twenty-four hour, seven day per week level has been shown to be a little more than seventeen million dollars. With FCC adding zero percent for that level of maintenance, FCC's alleged underpricing due to the zero addition would be the same number. Finding 29. Second, CDC's analysis is based on the assumption that NSWC will follow the evaluation model and order maintenance at the highest level--twenty-four hours per day, seven days per week. Id. This assumption is not proven. It is true, as CDC argues that Cray has a monopoly on maintenance of its processors. Finding 13. It may also be true that if NSWC orders maintenance for all processors at the highest level of service, FCC may lose money. FCC, however, priced its proposal at attractive discounts for a lesser level of maintenance, thus encouraging NSWC not to order the highest level of service. Finding 17. The highest level of maintenance was not, as a general matter, ordered by NSWC under the incumbent contract. Finding 21. NSWC knows of one customer who will need maintenance at the highest level of service. CDC has not demonstrated that all of NSWC's customers will order maintenance at that level. Finally, the expert's analysis does not take into account the assumptions FCC used in pricing its proposal. Finding 21.

This is not to say that FCC's pricing assumptions are conservative or correct, indeed they may prove to be wrong. But we know of no statute or regulation prohibiting vendors from taking calculated risks and aggressively pricing proposals. Nor do we know of a statute or regulation forbidding the Government to accept a good deal.

CDC argues that FCC cannot be a responsible contractor. That argument is belied by the conclusions of the pre-award survey and post negotiation clearance memorandum. FCC's finances were sound and FCC has a record of satisfactory performance on four open Government contracts. Finding 34, 35. The contracting officer performed a careful and thorough analysis of FCC's responsibility.

Reopening of BAFOs

The RFP warned vendors that unbalanced pricing was cause for rejection. Finding 24. The contracting officer properly found that FCC's hardware prices after the first BAFO were materially unbalanced. Findings 27, 28. Given the difference in pricing, the contracting officer sought approval of, and was granted permission to request, another round of BAFOs. Finding 28. CDC argues that regulation prohibits a procuring agency from requesting, in mid- procurement, another round of BAFOs to preserve a favorable price. CDC maintains that "in the absence of a prejudicial procurement error, the reopening of negotiations or the solicitation of second or subsequent BAFOs is prohibited, even if the acceptable offeror is higher in price." Protester's Brief at 12. We do not find the FAR so constraining. [FN7]

The FAR provides that after receipt of BAFOs the contracting officer should not reopen discussions "unless in is clearly in the Government's interest to do so." 48 CFR 15.611(c) (1990). We have ruled that it was in the best interests of the Government for the contracting officer to reopen discussions to evaluate an unbalanced maintenance credit pricing in order to obtain significant savings. Indeed, in that circumstance, we concluded that the contracting officer acted arbitrarily in not reopening discussions before award to obtain a lower price. Motorola Computer Systems, Inc. GSBCA No. 9170-P, 88-1 BCA ¶ 20,324, at 102,752-53, 1987 BPD ¶ 247, at 6-8. Motorola is equally applicable here. Indeed, the facts of this case are stronger than Motorola because the unbalanced item did not contribute to the price advantage. The price advantage lay in hardware maintenance, not hardware costs. Finding 29. It would have been foolish for the contracting officer, where cost of technically acceptable proposals was determinative, to sacrifice multi-million dollar savings without exploring whether FCC could submit balanced hardware prices.

Those cases which have refused to sanction reopening of discussions turn on the risk of auction prohibited by the FAR [FN8] either because of award or where prices had been revealed. Cf. International Business Machines Corp., GSBCA No. 11324-P (Sept. 24, 1991, slip op. at 14-15; Standard Mfg. Co., 65 Comp.Gen. 451 (1986), 86-1 CPD ¶ 304. Here, no award had been made and prices had not been revealed. Finding 28.

CDC argues that the Defense Federal Acquisition Regulation (DFAR) limits respondent's discretion to "compelling reasons" and that obtaining a favorable price is not a compelling circumstance. The DFAR provides in pertinent part:

> Second or subsequent requests for best and final offers require close monitoring and control at appropriate management levels in order to avoid auction techniques, enhance protection or source selection sensitive data and insure that contracts are awarded fairly and promptly. Unavoidable changes in requirements or funding or other compelling reasons may require a second or subsequent request for best and final offers.

48 CFR 215.611 (1990). First, the regulation is precatory, not prohibitory. Second, the phrase "changes ... in funding" as an example of a "compelling reason" in the DFAR strongly suggests that monetary factors can, in fact, supply "other compelling reasons." NSWC's budget for the procurement has been cut, Finding 31, and we cannot say in this time of reduction in defense funds, and multi-billion dollar budget deficits, that significant monetary savings to NSWC are not "other compelling reasons," particularly where no danger of auction exists. CDC's claim that the contracting officer violated that section fails.

Equipment Substitution

CDC claims that the premeditated substitution of a Cray YMP2E for the Cray YMP2 violates paragraph C.2.5.b of the RFP. CDC argues that the solid state storage device (SSD) used in conjunction with the Cray YMP2E was not announced for marketing purposes. Protester's Brief at 67. The problem with the argument is that it misconstrues the facts. FCC offers and continues to offer the Cray YMP2 with the SSD. This model is technically acceptable. FCC has also announced its intention to request from respondent an engineering change proposal so that it can use the SSD with the Cray YMP2E. Under the contract to be awarded to FCC, it is FCC's right to suggest an engineering change proposal and it is respondent's right to approve it, or to disapprove it. Findings 30, 32. The RFP put vendors on notice of this right. CDC has not shown a violation of statute and regulation arising from the anticipated substitution of equipment under the engineering change proposal clause.

Decision

CDC has not demonstrated that the contracting officer violated statute or regulation. The protest is DENIED. The suspension of respondent's delegation of procurement authority lapses by its terms.

ANTHONY S. BORWICK

Administrative Judge

We concur:

LEONARD J. SUCHANEK

Chief Administrative Judge

CATHERINE B. HYATT

Administrative Judge

1 Redactions are in brackets. The redacted version is issued on November 1, 1991.

2 Respondent and FCC filed motions to dismiss for failure to state a valid basis for protest. We reserved ruling pending a hearing on the merits. The motions are denied; the facts, if proven, do indeed form a valid basis for protest.

3 Phase 1 had two increments, as do phases 2 and 3. Later, for budgetary reasons, phase 1 was split to three increments. See Finding 31.

4 To avoid the cost of multiple technicians, CDC proposed to respondent a maintenance management program, whereby on-site CDC personnel would attempt to isolate the problem, and then call a representative of the original equipment manufacturer if needed. This proposal was rejected by respondent. Subsequent to discussions about the proposal, respondent issued paragraph C.1.1.8.3. requiring OEM-certified technicians performing the maintenance. Transcript at 209-10.

5 FCC offered twenty-four hour per day seven day per week hardware maintenance coverage as its basic hardware maintenance plan in its first BAFO. Protest File, Exhibit 3. Respondent did not consider FCC's hardware maintenance prices unbalanced. Protest File, Exhibit 23.

6 The idea to create additional increments for phase 1 to meet funding restrictions was CDC's. CDC suggested four increments for phase 1. Respondent's Hearing Exhibit 11.

7 The parties argue whether FCC's unbalancing of its hardware prices in its first BAFO was intentional. The intentional nature of the act might be relevant if respondent relied on 48 CFR 15.607(c)(3) (1990), correction of a mistake before award, as authority to reopen negotiations. We do not understand either respondent or FCC to claim that the unbalanced pricing was a "mistake" or to claim to act under 15.607(c).

8 See 48 CFR 15.610(d)(3) (1990).

1991 WL 229040 (G.S.B.C.A.), 92-1 BCA P 24,555, GSBCA No. 11376-P

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(Cite as: 972 F.2d 344, 1992 WL 182816 (4th Cir.(Va.)))

H
NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA4 Rule 36 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals,
Fourth Circuit.

UNITED STATES of AMERICA, ex rel.; Charles I. MCCOY; Seavac International, Incorporated-USA, *Plaintiffs-Appellants,*
v.
SEAWARD MARINE SERVICES, INCORPORATED, *Defendant-Appellee.*

No. 91-1642.

Argued: July 6, 1992
Decided: August 3, 1992

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.

Scott Alton Mills, FALK & CAUSEY, Washington, D.C., for Appellants.

Jerome P. Facher, HALE & DORR, Washington, D.C., for Appellee.

James H. Falk, Sr., James H. Falk, Jr., John M. Falk, FALK & CAUSEY, Washington, D.C., for Appellants, on brief.

James L. Quarles, III, HALE & DORR, Washington, D.C.; Buel White, Richard H. Saltsman, VERNER, LIIPFERT, BERNHARD, MCPHERSON & HAND, Washington, D.C., for Appellee.

E.D.Va.

AFFIRMED.

Before WILKINS, NIEMEYER, and HAMILTON, Circuit Judges.

OPINION

PER CURIAM:

**1 Charles McCoy and Seavac International Inc. [FN1] (the "Relators") appeal the district court's order granting judgment as a matter of law in favor of Seaward Marine Services, Inc. (Seaward) and, in the alternative, a new trial. Fed. R. Civ. P. 50, 59. The Relators brought this *qui tam* [FN2] action under the False Claims Act, 31 U.S.C. § § 3729-33 (the Act).

The Relators alleged that Seaward submitted false claims to the United States Navy (Navy) in connection with its contracts for providing ship hull-cleaning services. The Relators claimed that Seaward improperly: (1) billed for the cost of performing a partial hull-clean when the cost was in excess of a full hull-clean, (2) billed the Navy for mileage costs and per diem reimbursement on the same day, and (3) billed the Navy for per diem reimbursement for divers residing in the same area in which contract work was performed.

The jury returned a verdict in Seaward's favor on the first claim and in the Relators' favor on the second and third claims in the amount of $763,620, which was trebled under provisions of the Act.

Finding that the Relators failed to carry their burden of proving a false claim, the district court granted judgment as a matter of law in favor of Seaward, and in the alternative a new trial. This appeal followed.

We agree with the holding of the district court that the Relators failed to show that Seaward knowingly submitted a false claim to the United States Government, therefore, we affirm the decision of the district court. [FN3]

I

Seaward is a private contractor that performs a substantial amount of contract work for the Navy. Its services primarily consist of underwater cleaning of hulls and propellers on a variety of Navy ships. To provide this service, Seaward maintains teams of divers in zones which cover the Navy's areas of operation. Seaward provided these services in accordance with three consecutive fixed-price, indefinitequantity contracts. The particular contracts under which Seaward allegedly mischarged the Navy were the 1984 and 1989 contracts (Contracts).

With respect to the East Coast operations, the Contracts required Seaward to maintain a base office in Norfolk, Virginia. The Contracts provided that the Navy would reimburse Seaward for the per diem expenses of its divers, at a flat rate, as follows:

> The Contractor will also be reimbursed for the reasonable actual subsistence costs (including lodging) incurred after arrival at and prior to departure from a CONUS [Continental United States] remote work site.... The limitations applicable to subsistence will be in accordance with the Joint Travel Regulations for Department of Defense [(JTRs)]....

(Contracts Joint Appendix (J.A.) 1540, 1394). With respect to the East Coast operations, a remote work site is any work site other than the home base in Norfolk. The amount of the per diem reimbursement varied from location to location, depending on the monetary limitations established by the JTRs.

****2** The Contracts also allow Seaward a fixed amount per mile for the costs of moving men and equipment to a remote work site-referred to as mobilization- and the same amount per mile for the cost of returning men from the remote work site-referred to as demobilization.

> Mobilization/Demobilization are the total costs including crew salary incurred by the Contractor to move the equipment and crew to and from work locations [i.e. remote work sites] (outside of the normal base of operations) cited in the Task Assignment.

(Contracts J.A. 1392, 1538). The Contracts provide that these charges, collectively referred to as mob/demob charges, could not be incurred "simultaneously" with per diem charges, and neither mob/demob nor per diem expenses could be paid for operations in Norfolk. (Contracts J.A. 1394, 1540).

Seaward paid the per diem to its men for each day they were present at a remote work site. Seaward also billed for mob/demob costs for every day the men and equipment were in transit from or to a remote work site. As a result of these practices, on days when a crew arrived at or departed from a remote work site, Seaward billed for both mob/demob costs and per diem reimbursement. This is because, on such days, the crew was present at the remote work site for part of the day and in transit for part of the day. If the crew was in transit for an entire day and neither arrived nor departed a remote work site on that day, they did not receive a per diem reimbursement. The Relators contend that this policy violated the Contracts' provisions against billing mob/demob costs and per diem costs simultaneously.

Seaward paid the per diem to divers at remote sites even though some of the men maintained residences near the remote work site. The Relators contend that this policy was fraudulent. Although the contract does not specifically prohibit this, the Relators contend that the Contracts' reference to the JTRs incorporated the substantive provision of those regulations which, among other restrictions, precluded the payment of per diem expenses within the area of residence.

At trial, two witnesses from the Navy with contracting responsibility testified. One, the contracting officer, John Vollmer, was called by the Relators. The second, Michael S. Dean, the head of the Navy's Underwater Ship Husbandry Division, was called by Seaward.

Mr. Vollmer was the procuring officer with authority to sign and execute contracts on behalf of the Navy. Vollmer testified that Seaward was entitled to bill for per diem reimbursement incurred at work sites other than Norfolk, Virginia. He did not specifically testify that mob/demob and per diem could not be paid on the same day or that it was improper to seek per diem reimbursement for divers who lived near a remote work site. Vollmer did testify that Dean was the official responsible for overseeing the Contracts. Dean stated that he was responsible for the day-to-day supervision of the Contracts, that he initiated necessary changes, and that he wrote the 1989 contract. He testified that any location outside of Norfolk was a remote work site and that Seaward was entitled to reimbursement of per diem costs, regardless of the divers' residence, so long as the diver was at a remote work site. He further testified that no provisions of the JTRs applied to the parties' contractual relationship, other than the monetary ceiling limitations, and that it was permissible for Seaward to bill mob/demob and per diem costs on the same day, provided the crew arrived or departed the remote work site on that day.

****3** Seaward's President, John Armstrong, also testified that it was his understanding that the JTRs did not apply to the Contracts outside of the monetary ceiling limitations. He confirmed that Seaward paid per diem regardless of the divers' residence and billed for per diem and mob/demob expenses on the same day if the divers were both present at the remote work site and traveled on that day.

The district court determined that the unambiguous meaning of the word "simultaneously" did not encompass "on the same day." Furthermore, the district court stated that, even if the term was ambiguous, the clear testimony of both parties was that the Contracts permitted same day charges for per diem and mob/demob. The district court held, therefore, that Seaward was entitled to judgment as a matter of law on the same day charge claim.

With respect to the Relator's claim that it was improper, pursuant to the JTRs, to bill for per diem at remote work sites for divers who resided near those sites, the district court noted that the parties to the Contracts also agreed the JTRs, except with respect to per diem monetary limitations, did not apply to the Contracts. The residence of a diver, therefore, was irrelevant. The district court held that Seaward was entitled to judgment as a matter of law on this claim.

II

The standard for granting a judgment as a matter of law is essentially the same standard as that used for granting summary judgment. In discussing the relevant inquiry on motion for summary judgment and motion for directed verdict, [FN4] the Supreme Court stated: "the primary difference between the two motions is procedural ... In essence, though, the inquiry under each is the same: whether the evidence presents sufficient disagreement to require submission to a jury or whether it is so one sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986).

III

We agree with the district court's holding. In order to state a claim in this *qui tam* action, the Relators were required to plead and prove that Seaward:

> *knowingly* present [ed] or caus[ed] to be presented, to an officer or employee of the United States Government, or member of the Armed Forces of the United States a false or fraudulent claim for payment or approval.

31 U.S.C. § 3729(a)(1) (emphasis added). The use of the term "knowingly" has a special meaning within the context of the Act.

> Knowing and Knowingly defined-For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information-
> (1) has actual knowledge of the information;
> (2) acts in deliberate ignorance of the truth or falsity of the information; or
> (3) acts in reckless disregard of the truth or falsity of the information,
> and no proof of specific intent to defraud is required.

31 U.S.C. § 3729(b).

The Relators' claims are based on an alleged false interpretation of the Contracts by Seaward. As the district court noted, even if there is ambiguity in a contract, the parties' construction of that contract generally controls. *Management Sys. Assocs. v. McDonnell Douglas Corp.*, 762 F.2d 1161, 1172 (4th Cir. 1985), (citing *Cole v. Indus. Fibre Co.*, 157 S.E.2d 857 (N.C. 1931)). If both the contractor and the government interpret the contract one way throughout the contract's history, it is unthinkable that the contractor's billings which follow this common interpretation could constitute a false claim. Dean, the Navy's hull cleaning program director, contract technical advisor, and the author of the 1989 contract, testified that the per diem and mob/demob costs billed to the Navy by Seaward were appropriate. Armstrong, the President of Seaward also testified to this effect. [FN5] It cannot be said, therefore, that Seaward "knowingly" submitted a false claim. [FN6] The Relators failed to show an essential element of a false claims action and judgment as a matter of law was appropriate. Accordingly, we affirm the decision of the district court granting judgment as a matter of law in favor of Seaward.

****4** *AFFIRMED*

FN1. McCoy is a former employee of Seaward who now works for Seavac. Seavac is a direct competitor of Seaward.

FN2. A *qui tam* action is an action brought by individual(s) under federal law which provides for a penalty for the commission or omission of a certain act. The penalty, recoverable in a civil action, is shared by the government and the individual(s). *Qui tam* literally means"on behalf of." *Black's Law Dictionary* 1251 (6th Ed. 1990). Such an action is called a *qui tam* action because "the plaintiff states that he sues as well for the state as for himself." *Id.*

FN3. Our decision obviates the necessity of considering the district court's conditionally granting a new trial.

FN4 As of December 1, 1991, both the directed verdict and judgment notwithstanding the verdict are referred to collectively as"Judgment as a Matter of Law" under Fed. R. Civ. P. 50.

FN5. The Relators claim that there is a conflict in Armstrong's testimony on this point. We agree with the district court, however, that a comprehensive reading of Armstrong's testimony allows only one construction, *i.e,* that Armstrong interpreted the Contracts to permit same day charges and per diem reimbursement for divers residing near the remote sites. The Relators also argue that the actions of a Seaward supervisor, in informing a diver who lived near a remote site that he could not receive the per diem, indicated that Seaward's true interpretation was that the Contracts did not permit payment of per diem to divers residing near a remote site. However, the action of a single supervisor in one instance does not amount to a course of conduct, particularly when there was no evidence that the supervisor was told this was the proper interpretation of the Contracts, and where Seaward billed the Navy in accordance with Armstrong's interpretation and contrary to the supervisor's action.

FN6 The Relators emphasize that, at least with respect to ninety-two particular claims, it is clear that per diem charges were improperly billed. They base this on Armstrong's testimony that billing for per diem, while the crew was in Norfolk, was improper, and the summary of expense documentation indicated that demob to Norfolk occurred on the same day that travel to Norfolk occurred. The Relator's effort to differentiate these claims fails for two reasons. First, the only basis for the Relator's assertion that per diem and mob/demob were paid while the crew was in Norfolk was informal calendar entries prepared by a Seaward clerk. The only testimony concerning the meaning of these entries was given by that clerk. She testified that the entries did not mean the crew was paid per diem in Norfolk. Secondly, the Relators presented no evidence that the ninety-two claims were any different from the other claims in which mob/demob and per diem were paid on the same day, *i.e.,* no evidence was given that the crew was not present at the remote site sometime during the day the per diem was paid.

972 F.2d 344 (Table), 1992 WL 182816 (4th Cir.(Va.)), Unpublished Disposition

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